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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE CO., *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 60,000 members primarily represent injured plaintiffs in civil actions. ATLA members have served as class counsel as well as attorneys for class members.

Written consents of both parties to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Procedural due process demands that parties in civil actions, including class actions, be afforded notice and an opportunity to be heard. Meaningful notice in the context of a class action includes the opportunity to opt out of the lawsuit.

The crucial factor in determining whether to afford members of a plaintiff class the opportunity to opt out of the litigation is the weight of the individual interest at stake.

Although the class action device offers certain advantages in resolving large numbers of claims, it eliminates the ability of the client to control the prosecution of his or her own cause of action. The individual has a strong interest in having an opportunity opt out of class litigation at the initial stage in order to preserve a minimum degree of autonomy with respect to the claim. Judicial scrutiny of the adequacy of representation afforded the class does not protect the interests of individual claimants in deciding whether to participate in the litigation at all.

The individual also retains a strong interest in the opportunity of opt out of a class action to protect himself or herself from the effects of potential conflicts of interest with class counsel. The interest of the individual client, which provides a reference point for professional ethical conduct in individual civil actions, is missing in the class action context. As a result, class counsel is subject to pressure to promote a settlement that subordinates the interests of some class members to the interests of the majority, maximizes attorney fees, or suggests collusion with the defendant.

Judicial scrutiny of the adequacy of representation of the class may not provide sufficient protection to individual claimants. The opportunity to remove themselves from the litigation may represent the only practical recourse for dissatisfied class members. Moreover, the fact that the opt

out is available to class members may provide an incentive for class counsel to deal with class members as equitably as possible.

These strong individual interests are not limited to members of classes certified under Fed. R. Civ. Pro. 23(b)(3), which expressly provides for notice and opt-out. In practice, courts have recognized that fairness may demand that these safeguards be extended to members of Rule 23(b)(2) classes which seek monetary damages. Courts have used their discretionary authority to provide opt-out procedures under such circumstances. In view of the strength of the individual interest at stake, this Court should expressly recognize that such procedures are constitutionally required.

ARGUMENT

I. PROCEDURAL DUE PROCESS REQUIRES THAT MEMBERS OF A PLAINTIFF CLASS SEEKING MONETARY DAMAGES BE AFFORDED NOTICE AND THE OPPORTUNITY TO OPT OUT OF THE LITIGATION

A. Due Process Requires That Members of a Plaintiff Class Be Afforded Notice and An Opportunity to Be Heard.

Despite the complexity of the procedural history of this lawsuit, the question before this Court is fairly narrow and well-defined: Does due process require that members of a plaintiff class seeking monetary damages, certified under Fed. R. Civ. Pro. 23(b)(2), be afforded notice and an opportunity to opt out of the lawsuit?

The prior judgment which Petitioners seek to enforce, *In re Real Estate Title and Settlement Services Antitrust Litigation*, MDL No. 633, may not be given res judicata

effect if that judgment did not comport with due process. *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979), *citing Hansberry v. Lee*, 311 U.S. 32 (1942). ATLA urges the Court to uphold the determination by the Ninth Circuit that Respondents are not bound by the earlier judgment because they were not afforded the opportunity to exclude themselves from that class action.

Plaintiffs and defendants are both entitled to procedural due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court determined that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process. The Court in *Mullane* cautioned that the constitution is not satisfied by empty formality. "[W]hen notice is a person's due, process which is a mere gesture is not due process." 339 U.S. at 314-15.

Specifically addressing the rights of the members of a plaintiff class, the Court declared in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) that notice is an absolute requisite to the maintenance of 23(b)(3) actions. The Court stated that "notice to identifiable class members is not a discretionary consideration" but is "rather an unambiguous requirement of Rule 23." 417 U.S. at 176. The court required that notice be sent to over two million class members, specifically so that each would have an opportunity to "request exclusion from the action and thereby preserve his opportunity to press his claim separately." 417 U.S. at 176.

In *Eisen*, the Court made it clear that the notice requirement is applicable to class actions. Moreover, the Court indicated that the purpose of notice, in the class action context, is to afford class members the opportunity to opt out of the lawsuit. *Eisen*, of course, involved a class action for monetary damages certified under Rule 23(b)(3), which

expressly provides that class members be afforded notice and an opportunity to opt out. This Court has made it clear, however, that these procedural requirements are based not only in the text of the rule, but also on the command of the Due Process Clause. *See*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) In the present case ATLA urges the Court to hold that members of a class seeking monetary damages are similarly entitled to notice and the opportunity to opt out where the class was certified under Rule 23(b)(2), which does not explicitly provide for those procedures.

B. Meaningful Notice in the Context of a Class Action Must Include the Opportunity for Class Members to Exclude Themselves From the Lawsuit.

The *Mullane* Court emphasized that the constitutional right to notice "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S. at 314. In *Eisen* the Court required that notice be sent to over two million class members, specifically so that each would have an opportunity to "request exclusion from the action and thereby preserve his opportunity to press his claim separately." 417 U.S. at 176.

The procedural safeguards clearly have a constitutional foundation. The Advisory Committee's Note to Rule 23 explains that "mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill the requirements of due process to which the class action procedure is of course subject." 28 U.S.C.A. Rule 23 (Adv. Comm. Note). In *Eisen*, the Supreme Court endorsed the Advisory Committee's position that the notice provisions of Rule 23 are "designed to fulfill requirements of due process." 417 U.S. at 173. Notice and the opportunity to opt out may be viewed as a specific application of a fundamental principle of fairness -- that no one can be bound

by the judgment in an action without his or her consent. *See, Martin v. Wilks*, 490 U.S. 755, 762 (1989). As Professor Grosberg points out, however, this leads to an anomaly in Rule 23:

> The rule 23 framework is paradoxical in that the rule requires notice to class members and an opportunity to opt out of Rule 23(b)(3) class actions, whereas no such notice is required nor is a chance to opt out afforded to class members in Rule 23(b)(1) or (b)(2) class actions. Thus, in Rule 23(b)(3) class actions, assuming there is actual notice, there is consent of sorts (either tacit or explicit) of all class members. A Rule 23(b)(1) or (b)(2) class action does not require even this limited form of consent.

Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 Syr. L. Rev. 709, 745, n. 165 (1989)

In this case, the Court is called upon to resolve that anomaly. The historical development of the class action remedy and the constitutional underpinnings of the notice and opt-out requirements are compellingly set forth in the Brief of Respondent and in the amicus briefs of Trial Lawyers for Public Justice and Public Citizen. ATLA will not burden the Court with lengthy repetition of those arguments.

It is worth noting, however, that nothing in the text of the rule precludes a district court from protecting the due process rights of Rule 23(b)(2) class members by ordering notice and opt-out where, as in the present case, claims for monetary damages are asserted in a context that closely resembles a Rule 23(b)(3) class action. *See, e.g., Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986)(approving the opt-out procedures in Rule 23(b)(2) class actions). Petitioners argue that explicitly recognizing these constitutional safeguards would undermine the usefulness of the class action device. Brief of Petitioner at 26-

28. Even if this speculation were well-founded, this Court has long insisted that the advantages of class actions may not constitutionally be gained at the expense of the due process rights of individual class members. *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). *See* Gerald E. Rosen, *Title VII Classes and Due Process: To (b)(2) or Not To (b)(3)*, 26 Wayne L. Rev. 919, 926 (1980).

II. THE INDIVIDUAL'S INTEREST IN MAINTAINING AUTONOMY OVER A CAUSE OF ACTION AND IN ASSURING ADEQUACY OF REPRESENTATION BY CLASS COUNSEL MANDATE NOTICE AND OPPORTUNITY TO OPT OUT AS A MATTER OF DUE PROCESS.

A. An Opportunity to Exclude Oneself From Litigation Instituted On One's Behalf Without One's Consent Is Essential to the Individual's Fundamental Right to Autonomy In the Conduct of Civil Actions.

A critical issue before this Court in determining whether the Due Process Clause includes the right to opt out of a class action is the weight that should be accorded to the individual interest under the balancing test prescribed in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Ticor argues that this interest "is not entitled to much weight." Brief of Petitioner at 10. Petitioner further maintains that this interest is fully protected by the judicial determination under Rule 23 of the adequacy of representation. *Id.*

ATLA members have gained an appreciation of the individual's interest through their representation of individuals in actual class actions. Some ATLA members serve as class counsel; others frequently represent class members who are faced with the loss of an otherwise meritorious cause of action based upon a judgment in a class

action brought on their behalf. This experience reinforces ATLA's belief in the basic principle that

> The integrity, autonomy and dignity of the person is protected when clients make the decisions affecting their lives. As the owner of a legal claim, the client should have a 'presumptive right of control.' It is 'the client who will have to live with the outcome.'

Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 Syr. L. Rev. 709, 719 (1989) (footnotes omitted). The right to participate in one's own litigation clearly has constitutional dimensions. Note, *Due Process: Accuracy or Opportunity?*, 65 So. Calif. L. Rev. 2705, 2714 (Sept. 1992).

In a traditional civil action for money damages, the client is the master of his or her own cause of action. This principle serves as the pole star, defining the plaintiff's attorney's course of professional ethical conduct. No one would deny that the client is entitled to decline to file a lawsuit, despite the attorney's belief in the merits of the claim. The plaintiff is equally entitled to withdraw from the lawsuit, even in the face of counsel's advice. The client may have a good reason, bad reason, or no reason at all for this decision. The power to walk away from a civil action also serves to enhance the client's control over the course of the litigation.

The class action device serves a number of valuable goals in the civil justice system. In some situations, it may provide a remedy for those whose claims could not otherwise be adjudicated. But permitting the aggregation of claims in this fashion exacts a price. "Ordinary notions of client control, let alone participation in decisionmaking, are not viable in class actions." Grosberg, *supra*, at 786. From the trial lawyer's perspective, the pole star representing the wishes of the client fades and disappears into the diffuse "interest of the class."

ATLA does not suggest that the full measure of client control be replicated in the class action context. However, a minimum level of client control can be preserved by affording class members the opportunity to "vote with their feet" at the initial formal stage of the lawsuit. The right to opt out allows class members to express their dissatisfaction by abandoning the class action entirely. Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions*, 69 Va. L. Rev. 11, 26-27 (1983). Equally important, a real threat that a significant portion of the potential class may exercise this option may act as an incentive for class counsel to consult with class members in a meaningful way. In this fashion, the opt-out right can provide guidance to class counsel as well as preserve a measure of client autonomy.

B. Judicial Scrutiny of the Adequacy of Representation of the Class Does Not Protect the Individual's Right to Autonomy In the Conduct of Civil Actions.

Petitioner argues that any interest on the part of the individual in preserving some control over the litigation is fully protected by the requirement in Rule 23 that the court assure the adequacy of representation of the class. Brief of Petitioner at 10. ATLA submits that the individual's interest in not participating in the class action is not addressed by the adequacy determination.

An individual who possesses a cause of action for monetary damages may, for a variety of reasons, reject adjudication of his or her claim as part of a class action. The individual may desire to pursue that claim in an individual action. Not every plaintiff class seeking monetary damages is made up of claims that would not be economically viable in separate actions. Some may justifiably believe that a separate suit holds a better prospect for full compensation.

Some may strongly desire to present their case to a jury. This Court has historically championed the right to trial by jury, cautioning that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872). *See also*, *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence"); *Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939)("It is essential that the right to trial by jury be scrupulously safeguarded"); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)("any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care").

This right is of particular significance in light of the broad powers accorded district courts in steering and shaping class actions. Indeed, the specific target of drafters of the Seventh Amendment, as reflected by the constitutional text, is the power of the judiciary, reflecting the colonists' bitter experience with autocratic judges. *See*, Roscoe Pound, The Development of Constitutional Guarantees of Liberty 69-72 (1957); Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). The right to trial by jury is essentially a check on the power of the federal judiciary. *See*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979)(Rehnquist, J., dissenting); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 83 (1989)(White, J., dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge"). The opportunity to opt out of a class action for purposes of exercising one's Seventh Amendment right should not depend upon whether the class action was classified as a Rule 23(b)(2) or Rule 23(b)(3) proceeding.

Class members may determine that it is in their best interests not to prosecute an otherwise meritorious claim at all. The decision not to sue is also worthy of due process protection. *See*, Note, *Due Process and Equitable Relief in*

State Multistage Class Actions After Phillips Petroleum Co. v. Shutts, 68 Tex. L. Rev. 415, 439 (1989). It is not unreasonable that some workers may view the prospect of prevailing in a class action against their employer as not worth the adverse impact on relations with management and co-workers. *See* Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1187-88 (1982). Shareholders may conclude that the adverse impact of a class judgment against their corporation outweighs the value of the damages sought. Similar concerns may lead individuals to forego the chance to recover relatively small amounts against governmental or publicly-funded entities in view of the realization that the burden of satisfying the judgment, augmented by litigation costs, will ultimately fall upon them as residents or taxpayers.

Obviously, a judicial determination that the class was adequately represented does little to safeguard the interests of class members who, for whatever reason, would reject the class action altogether. This practical limitation on the adequacy determination supports this Court's statement in *Eisen* that adequate representation alone is not the "touchstone of due process." *Eisen*, *supra* at 176. To suggest that adequate representation by itself was sufficient for due process, the Court stated, would "prove too much" because it would lead to the conclusion that no notice was necessary provided that there was adequate representation of the members of the class. *Id.* at 176-77.

C. The Opportunity to Opt Out of Class Actions Affords Class Members Some Protection Against Representation That Is Contrary to Their Interests.

One commentator has observed:

> Two features of class actions that most distinguish them from two-party suits are the degree of management

> required and the problems of client control and conflicts of interest. These two general, yet unique, characteristics of class litigation explain some of the peculiar pressures placed upon the modern class action lawyer....

Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 Texas L. Rev. 385, 389 (1987).

While problems of client control were addressed in the previous sections, ATLA is also concerned with the potential conflicts of interest which arise in the class action context. These frequently surface in connection with the settlement of the class action. *Wyatt v. Horsely*, 793 F. Supp. 1053, 1055 (M.D. Ala. 1991)("The settlement process in class actions is more susceptible than adversarial adjudications to certain types of abuse.")

These include the incentive to favor one set of class members to the detriment of others. *See, e.g., Franks v. Kroger Co.*, 649 F.2d 1216, 1226 (6th Cir. 1981)(reversing the district court's approval of a settlement when "the 'preferred position' of the named plaintiffs should have signaled the district court of potential inequities in this proposed settlement"); *Plummer v. Chemical Bank*, 91 F.R.D. 434, 441-42 (S.D.N.Y. 1981)(rejecting the settlement in an employment discrimination case because the named plaintiffs received favorable monetary awards and promotions, and plaintiffs' attorney received a large fee, while the plaintiff class received nothing previously unavailable to them under the employer's affirmative action program).

Additionally, some attorneys may tend to compromise high-stake plaintiffs claims to further the settlement process. Note, *The Propriety of Class Actions in Mass Aviation Disaster Litigation*, 56 J. Air L. & Comm. 559 (1990). As one commentator explains, "Plaintiffs whose claimed injuries are near or below the mean may find it expedient to sell out

the high-stakes plaintiff by negotiating a class settlement with the defendants on a basis that increases the minimum recovery but lowers the maximum recovery per plaintiff." Note, *Class Actions in the Asbestos Contest: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 Tex. L. Rev. 211, 222 (1991).

There is the inclination by class counsel to promote a settlement which maximizes his or her fees.

> In a class suit, because of the absent member's attenuated relationship to the litigation, they may not know whether a compromise favors greater attorneys' fees and lesser benefits for them. Professor Wolfram has noted that "most [class action] lawyers regard themselves as entrepreneurs and largely act accordingly"; their self-interest can be restrained only by client control. If he is correct, then nothing in the class setting prevents attorneys from following their "natural inclinations," compromising the absent members' interests in order to receive larger fees.

Mary Kay Kane, "Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer," 66 Texas L. Rev. 385, 395-96 (1987).

Frequently counsel operates under considerable pressure to enter into a collusive settlement with the defendant. *See* Coffee, *Understanding the Plaintiff's Attorney*, 86 Colum. L. Rev. 669, 714-16 (1986).

Amicus, as an organization of trial attorneys, is especially concerned with the roles of plaintiffs and their attorneys in the class action process. In the context of individual-plaintiff litigation the roles of the attorney and the client are well defined. The A.B.A. Code of Professional Responsibility envisions the attorney as an advocate of the interests of the client. American Bar Ass'n, Code of Professional

Responsibility, Ethical Consideration (hereinafter "EC") 7-1. Although the lawyer has some freedom to make tactical choices during litigation without consulting his or her client, the lawyer is expected to defer to the client's wishes on major litigation decisions. *See* ABA Code EC 7-1, EC 7-7, EC 7-9. It remains unclear whether this model can be carried over to the class action context, as no generally accepted and enforceable concept of the allocation of decision-making responsibility between the attorney and the class members has yet emerged. *See generally, Developments in the Law--- Class Actions*, 89 Harv. L. Rev. 1318, 1578 (1976).

Even if the class attorney were diligent in trying to represent all interests, there is generally a lack of clearly identifiable client interests in a class action. Rhode, 34 Stan. L. Rev. at 1183. As the Fifth Circuit has stated, "the traditional notion of the client deciding important litigation questions is often problematic in the class action context because of the difficulty in identifying the client." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978).

Although judges are responsible for policing settlements, they rarely set them aside. *See* Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 895 (1987). In fact, courts often accord great weight to the opinion of counsel for the class in approving class action settlements. *See Pettway, supra*, 576 F.2d at 1215 ("trial court is entitled to take account of the judgment of experienced counsel for the parties"); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Wyatt v. Horsely*, 793 F. Supp. 1053 (M.D. Ala. 1991). Thus, while class action procedures technically include some checks on the settlement process, class members are generally dependent on the good faith efforts of the class attorney for their remedies. *See also Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)(recognizing the potential conflict between attorneys

and the class they represent); 7A C. Wright and A. Miller, *Federal Practice & Procedure* § 1797, p.183 (1972).

It is no denigration of the federal judiciary to recognize that class members may often be more sensitive to potential conflicts between their interests and those of class counsel. Those who fear that their interest in full recovery will be subordinated to the interests of the majority in reaching a settlement can protect themselves by opting out of the litigation. Those who are not confident in the undivided loyalty of class counsel can, in effect, fire their attorney by opting out. The possibility that class members may "vote with their feet" may provide some incentive for class counsel to deal forthrightly with all class members.

III. THE DUE PROCESS PROTECTIONS OF NOTICE AND OPPORTUNITY TO OPT OUT SHOULD BE EXTENDED TO MEMBERS OF CLASS ACTIONS CERTIFIED UNDER FED. R. CIV. PRO. 23(B)(2) WHICH SEEK MONETARY DAMAGES

The issue before this Court is whether the safeguards of notice and an opportunity to opt out of the litigation provided to members of Rule 23(b)(3) classes should also be available to members of classes certified under Rule 23(b)(2) as a matter of fundamental fairness. Certainly the individual's interest in preserving some minimal level of autonomy and control over his or her own cause of action is not limited to members of Rule 23(b)(3) classes.

A. Federal Courts, Recognizing That Fairness Mandates Affording the Opportunity to Opt Out, Have Exercised Their Discretionary Authority to Provide that Safeguard Where Not Expressly Required by Rule 23.

ATLA suggests that the experience of a number of federal courts facing this question is instructive. Those courts have attempted to satisfy the demands of fairness by employing their considerable discretion to extend these safeguards beyond the extent demanded by the text of the Rule.

For example, in *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) the Second Circuit warned that an "overbroad framing of the class may be so unfair as to approach, if not amount to, deprivation of due process." *Id.* at 1337-38, *citing Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1126-27 (5th Cir. 1969). In *Haitian Centers*, the Second Circuit declined to apply the doctrine of collateral estoppel based on a finding that the class defined in the case was overly broad and there had been antagonistic interests within the class that should have been handled by redefining the class or creating subclasses under Rule 23(c)(4). 969 F.2d at 1337, *citing* Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 1775 at 457 (2d ed. 1986).

Courts have also shown an increasing "concern with providing the due process rights of the individual class members" in Rule 23(b)(2) class actions. *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. Unit B 1981). Similarly in *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 634-35 (9th Cir. 1982), a Title VII class action certified under subsection (b)(2), the Ninth Circuit allowed an opting out in part because "[g]iven the breadth and nature of the claims asserted, the class allegations in plaintiffs' complaint, and the procedures adopted by the district court, it appears clear that this case was in essence a Rule 23(b)(3) action."

In *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983) the court went even further and held that "the presence in the lawsuit of a significant number of atypical

claims not common to the class activates a requirement that absent class members be given an opportunity to opt out of the class at the monetary stage of the Title VII lawsuit or settlement." 706 F.2d at 1155. In the court's view, refusing to provide an opportunity to opt out of the class at the monetary relief stage of a Title VII lawsuit or settlement was an abuse of discretion. "Because the monetary relief stage of this particular Title VII case [was] functionally more similar to a (b)(3) class than a (b)(2) class, the opt out protection of (b)(3) must be applied." 706 F.2d at 1155.

In concluding that a right to opt out was required, the *Holmes* court examined the distinctions between the (b)(2) and (b)(3) actions. It found that the very nature of a (b)(2) class was that it was homogeneous without any conflicting interests between the members of the class. *See also Allen v. Isaac*, 100 F.R.D. 373, 375-77 (N.D.Ill. 1983)(court exercised its discretion under Rule 23(d)(2) to permit class members to opt out, where it concluded that a 23(b)(2) action was, in reality, a hybrid 23(b)(2)-and-23(b)(3) action.

In cases where monetary damages as well as injunctive relief is sought by class action plaintiffs, many courts and commentators find that the notice provisions of 23 (b)(3) are appropriate. In *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979) the Fifth Circuit held that a prisoner who had received no notice of a class action was not precluded from adjudicating his claim for monetary damages. The court stated that while "under the text of Rule 23 and the cases interpreting it notice is not required in all representative suits in order to bind absent class members, due process requires that it be provided before individual monetary claims may be barred." 598 F.2d at 437. The court reasoned that this holding "does no violence to the general rule making notice only discretionary in Rule 23(b)(2) cases" because "the decisions from which that rule derives presuppose that Rule 23(b)(2) class actions will be limited to class suits seeking only equitable relief." *Id.* at 437. When "only equitable relief

is sought in an action involving a cohesive plaintiff group such as a class of black employees at an assembly plant, the due process interest of absent members will usually be safeguarded by adequate representation alone." *Id.* at 437. By contrast, in cases where "individual monetary claims are at stake, the balance swings in favor of the provision of some form of notice. *Id.* at 438. *Accord, Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978), cert. denied, 444 U.S. 883 (1979).

The Fifth Circuit and Eleventh Circuit Courts, among others, have acknowledged that "the monetary relief stage of a Title VII case often 'begins to resemble a 23(b)(3) action' and that courts have shown increasing 'concern for providing for the due process rights of individual class members.'" *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1154 (11th Cir. 1983), *citing Penson v. Terminal Transport Co., supra*, and *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

Other courts have exercised their discretionary powers in certain circumstances to require that 23(b)(2) class members receive notice and an opportunity to opt-out of the litigation. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986)(approving the opt-out procedures in Rule 23(b)(2) class actions as provided for in *Penson* and *Holmes*); *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979)(the opportunity to opt out of the class served to ameliorate any "antagonistic interests" between the class representatives and the absent members); *Bogard v. Cook*, 586 F.2d 399, 409 (5th Cir. 1978)(the opt-out right was designed to permit the class members to seek monetary relief in individual actions if they so chose rather than be limited to the injunctive relief sought in the class action); *Bauman v. United States Dist. Court*, 557 F.2d 650, 659-60 (9th Cir. 1977)(District Court's order permitting Title VII class plaintiff to opt out of Rule 23(b)(2) class was not erroneous as a matter of law); *DeGier v. McDonald's Corp.*, 76 F.R.D. 125 (N.D. Cal. 1977); *Walker v. Styres Indust.*, 21 Fed. Rules

Serv. 2d 355 (M.D.N.C. 1976)(Title VII class action in which both injunctive relief and money damages were sought; the Court ordered notice of type similar to that required by (b)(3)); *Ostapowicz v. Johnson Bronze Co.*, 54 F.R.D. 465, 466 (W.D. Pa. 1972)(court "has discretionary power to require notice under Rule 23(a) and in our discretion we do require that such notice be given so that requirements of due process be satisfied and all members . . . be given an opportunity to join or opt out.")

B. The Text and Background of Rule 23(b) Support the Extention of Opt-Out Rights to Members of Rule 23(b)(2) Classes Seeking Monetary Damages.

These decisions reflect a principled recognition that fundamental fairness demands that the opportunity to opt out be afforded to members of a plaintiff class whose individual interests in preserving a measure of autonomy closely resemble those of Rule 23(b)(3) class members. Generally speaking, those interests are most similar where the members of a Rule 23(b)(2) class primarily seek monetary damages, as distinguished from injunctive relief.

The distinction between strictly equitable relief and relief requiring individualized treatment finds support in the Supreme Court's language in *Eisen* and *Sosna v. Iowa*, 419 U.S. 393 (1975) which explicitly equates actions for equitable relief with subsection (b)(2) and actions for monetary relief with subsection (b)(3). *Id.* at 432, *citing Eisen, supra*, 417 U.S. at 177 n.14; *Sosna, supra*, 419 U.S. at 397.[1]

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[1] It is important to note that while *Eisen* applies only to the mandatory notice provisions for Rule 23(b)(3) actions, the Court in *Sosna v. Iowa*, 419 U.S. 393 (1975), explained that the notice problems in *Eisen* were not implicated when a 23(b)(2) class action was involved:

Professor Moore fully endorses this view and goes even further:

> Subdivision (b)(2) is limited to actions where injunctive or declaratory relief on behalf of the class is the exclusive or predominant final result sought. Thus a request for such a remedy merely in aid of a suit for money damages, to preserve the status quo, for instance, would not bring the action within (b)(2). Similarly, where it is clear that the real aim of the litigation is the ultimate money award, with a plea for injunctive relief appended as a formality or a very secondary consideration the action should be classed within (b)(3). If, however, injunctive relief and damages would be equally appropriate remedies, and both may be obtained, the court should divide the suit into subclasses handled under the separate subdivisions of (b); in many such situations class action may only be necessary for the injunctive aspect, with those individuals suffering actual injury pressing their individual claims for damages in a separate count.

3B *Moore's Federal Practice* par. 23.45, at 23-296 to 23-297 (2d ed. 1993). Professors Wright and Miller are also in accord. C. Wright and A. Miller, *Federal Practice and Procedure* §1775, at 21.

> Although the complaint did not so specify, the absence of a claim for monetary relief and the nature of the claim asserted disclose that a Rule 23(b)(2) class action was contemplated. Therefore, the problems associated with a Rule 23(b)(3) class action, which were considered last Term in *Eisen* . . ., are not present in this case.

Id. at 397 n.4 (citation omitted).

Subsection 23(b)(2), by its terms, clearly envisions a class defined by the homogeneity and cohesion of its members' grievances, rights, and interests. Rosen, *Title VII Classes and Due Process: To (b)(2) or Not to (b)(3)*, 26 Wayne L. Rev. 919, 923 (1980). The import of the language of (b)(2) is that the claims contemplated by that section are class claims, claims resting on the same grounds and applying more or less equally to all members of the class. Because the interests of the (b)(2) plaintiffs are substantially cohesive, it makes it likely that representative members can adequately represent the interests of absent members, conflicts will be minimal, and there will be little need for an interest in individual representation. Members who are not notified or given an opportunity to exclude themselves from the class before their rights are adjudicated are not deprived of due process since their claims rest on precisely the same grounds as the other members' claims, and all the issues they could have raised were, in fact, adjudicated in the context of the class. Too, their relief, if any, was also intended to be identical: *e.g.* a halt to the alleged wrongful actions or policies. *Id.* at 925. As the Fifth Circuit noted, opting out of a 23(b)(2) suit seeking only injunctive relief would have little practical value or effect. Even class members who opted out could not avoid the effects of a judgment---a 23(b)(2) injunction would enjoin all illegal action, and all class members would necessarily be affected by such broad relief. *Johnson*, 598 F.2d at 437-38. *See* Note, *Statutes of Limitation and Opting Out of Class Actions*, 81 Mich L. Rev. 399, 401 n.8 (1983). Under such circumstances, one commentator has posited, the contribution that individual notice and the right to opt out can make to buttressing adequate representation is not great enough to warrant a mandatory procedural or constitutional requirement. Note, *Notice in Rule 23(b)(2) Class Actions for Monetary Relief: Johnson v. General Motors Corp.*, 128 U. Pa. L. Rev. 1236, 1252 (1980).

The distinctions between (b)(2) and (b)(3) class actions led the Advisory Committee to conclude that binding all members of a (b)(3) class was not as fair as binding all members of a (b)(2) class. *Wetzel v. Liberty Mut'l Insur. Co.*, 508 F.2d 239, 249 (3d Cir. 1975). The requirement of homogeneity of rights and interests among 23(b)(2) class members is reinforced by the Advisory Committee's Note to the Federal Rules of Civil Procedure 1966 Amendments, which states that the (b)(2) subdivision was not intended to "extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2), Advisory Committee's Note 241 (1975).[2] By the very nature of a heterogeneous (b)(3) class, there would be many instances where a particular individual would not want to be included as a member of the class. To respect these individual interests, Rule 23 (c)(2) was written to afford an opportunity to every potential member to opt out of the class. Advisory Committee's Note to Proposed Amendments to Rule 23, 39 F.R.D. 69, 104-05 (1966).

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[2] The Committee Notes emphasize:

> The subdivision is intended to reach situations where . . . final relief of an injunctive or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate . . . The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.

Advisory Committee's Note 241 (1975) (emphasis added).

CONCLUSION

For these reasons, Amicus urges this Court to affirm the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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